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No. 84-1655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARY P. LAFFEY, *et al.*,

Petitioners,

v.

NORTHWEST AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, in which the court of appeals reversed a fee award to a private, for-profit law firm that would have yielded the firm approximately four times the hourly rates that it charges its own regular, fee-paying clients, the questions are:

1. Did the court of appeals correctly hold that, in calculating a reasonable attorneys' fee award to a private, for-profit law firm that devotes 95% of its time to work for fee-paying clients, the district court should use the regular hourly rates the firm routinely charges those clients in similar types of litigation as presumptively indicating the market value of the firm's services?

2. Was it permissible for both courts below to rule that the circumstances of the case were not so "exceptional" as to justify awarding a 100% "quality multiplier" in addition to the "lodestar," when the courts found that (i) the quality of representation by plaintiffs' counsel was not superior to the representation that the firm normally provided to its regular, fee-paying clients and (ii) plaintiffs' counsel are to receive their full rates for their hours, two-thirds of which were logged by partners, and when the size of the recovery was the result of the size of the class and the length of the recovery period, not the result of any extraordinary achievement by plaintiffs' counsel?

3. Assuming that upward adjustments in fee awards may be granted in appropriate cases because of risk or "contingency," was it permissible for the court of appeals to determine that the risk found by the district court — that plaintiffs were at least as likely to win as to lose — was not so "unusual" as to warrant a 100% "contingency bonus"?

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Respondent Northwest Airlines, Inc., submits that this case does not warrant review by this Court.

STATEMENT

Petitioners' statement of facts is remarkable for what it does not contain. Nowhere do petitioners mention the amount of money that they requested as a "reasonable" attorneys' fee, the amount awarded by the district court, or the value of their award when calculated in accordance with the decision that they are now challenging. Although they leave the impression that they have been treated penuriously by the court of appeals, that court's approach will yield petitioners' counsel in excess of $1 million.

1. The Fee Application

In sum, petitioners' counsel sought over $5 million for about 11,000 attorney-hours on the merits of the litigation and for another 2,600 hours of attorney-time devoted exclusively to the fee litigation. In constructing what they viewed as a "reasonable" fee, they applied for "lodestar" hourly rates almost double those charged to the firm's own extensive array of regular, fee-paying clients. In addition, they asked for a 100% increase for the "quality of representation," and *another* 100% increase for the "risk" of nonsuccess. Using this approach, even though petitioners' lead counsel charged his own regular clients less than $100 an hour, he asked the district court to order the defendant to pay him as much as $525 per hour for his time in this case. The district court awarded over $3.5 million in fees and expenses, acceding to all of petitioners' requests except for the "quality" multiplier. Applying the principles that this Court and other circuits have settled, the court of appeals concluded that the district court's fee award was excessive.

The district court had determined in 1974 that petitioners were entitled to attorneys' fees. When petitioners' counsel filed their formal fee application in 1983, the only issue was the reasonable *amount* of the fee. Nevertheless, counsel filed what the district court termed "the most extensive fee application this Court has ever received" (App. 78a). As the court below found (App. 51a), the fee application spawned the sort of "second major litigation" that this Court repeatedly has admonished fee applicants to avoid. *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983); *Blum* v. *Stenson*, ___ U.S. ___, ___, 104 S. Ct. 1541, 1550 n.19 (1984). Petitioners' counsel, Bredhoff & Kaiser, specially engaged a second law firm, Arnold & Porter, to assist it in litigating the amount of attorneys' fees. As a result, "more attorneys worked on the fee request than ever worked on the merits" (App. 51a). Petitioners' initial fee application encompassed

five volumes, and included a 176-page memorandum of law, a 182-page affidavit of petitioners' lead counsel reciting the history of the litigation to the same district judge who had presided over the case, and 28 affidavits from other attorneys attesting to their own hourly rates, the significance of the underlying litigation, and the prestige of petitioners' counsel. The fee litigation also involved substantial discovery, including interrogatories, document requests, depositions, and, of course, the inevitable motions to compel.

In a little over a year, petitioners' counsel devoted over 4,300 professional hours — two and one-half person-years of attorney and paraprofessional time — to pursuing their fee. That extraordinary investment of time equalled 31% of the total number of professional hours that petitioners' counsel had devoted to the merits of the case over the prior 13 years; indeed, as the court of appeals remarked, the figure is greater than the number of hours that "were billed in any given year on the merits" (App. 51a). Not surprisingly, the court of appeals was "aghast at the hours devoted to the fee request" *(id.)*.

2. Hourly Rates

In this Court as in both courts below, petitioners' counsel have denied the relevance of their own billing rates by portraying themselves as representing "working people and non-profit clients" (Pet. 5). Although they attempt to cloak themselves in the mantle of public-interest lawyers, the record establishes that virtually all of the firm's regular clients are large, well-financed national labor unions and union pension funds, including the AFL-CIO, the United Steelworkers of America, the Oil, Chemical & Atomic Workers, and the Amalgamated Transit Union. The firm has represented those clients — as plaintiffs or defendants — in numerous employment discrimination cases, including, for example, *Franks* v. *Bowman Transportation Co.*, 424 U.S.

747 (1976); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982); and *Pullman-Standard Co.* v. *Swint*, 456 U.S. 273 (1982). In handling all of those cases, and in representing other institutional clients, the firm has adhered to a schedule of regular hourly rates. Dispelling any notion that the firm depends on contingent fee cases, the record establishes that the vast majority of the hours worked by all attorneys at the firm are billed to its institutional clients at regular hourly rates on a current basis and are paid in full.

Nevertheless, the district court disregarded the firm's normal rates and billing practices. The district court also ignored the uncontroverted evidence that the rates charged by petitioners' counsel are actually on the high end of rates (1) generally charged by union-oriented labor law firms and (2) awarded by courts in the District of Columbia to lawyers with comparable qualifications. Instead, in the belief that the rates the firm regularly charges in the marketplace do not reflect the "true value" of its professional services (App. 106a), the district court used lodestar rates almost double the rates the firm's regular clients pay.

On appeal, the court of appeals held that it was improper to award lodestar rates that bear no relation to the rates the firm actually charges its own clients (App. 41a). The court found that the district court "apparently *relied not at all* on the firm's normal billing rates" (App. 10a) (emphasis in original), or on any of the other evidence in the record, except the higher hourly rates charged by *other* firms which, according to petitioners' counsel, reflected the "true value" of their own services. The court of appeals concluded that the rates selected by the district court were "arbitrary" and were chosen with "no analysis of the market for legal services" and "no explanation as to why the Bredhoff & Kaiser attorneys were worth more in this case

than they were in similar cases litigated at the same time" (App. 31a).

The court of appeals reasoned that, under the approach that this Court took in *Blum* v. *Stenson, supra,* as well as its own precedents in *Copeland* v. *Marshall,* 641 F.2d 880 (D.C. Cir. 1980) (*en banc*), and *National Association of Concerned Veterans* v. *Secretary of Defense,* 675 F.2d 1319 (D.C. Cir. 1982), the "rates customarily charged" by a for-profit law firm "would presumptively stand as the reasonable rates" (App. 21a, 22a-25a). The court also noted, in accordance with economic evidence in the record, that using an attorney's customary billing rate in computing a fee award fulfills the twin statutory purposes of attracting competent counsel and awarding fully compensatory fees, because this approach provides the attorney with the "opportunity cost of foregone representations" (App. 27a), while avoiding the "windfalls to attorneys" that Congress cautioned against (App. 22a). In addition, the court viewed this approach as highly beneficial to the administration of justice, since it largely eliminates "the substantial costs of turning every attorneys fee case into a major ratemaking proceeding" (App. 40a), and since its predictability encourages settlement of attorneys' fee disputes (App. 33a-34a).

3. Quality Multiplier

The district court denied petitioners' application for a 100% bonus for the "quality" of counsel's performance. They suggest that the district court did so solely because their performance was "no more than the Court or Plaintiffs would demand of counsel" who charged the high hourly rates that the court used in calculating the lodestar (App. 114a). On the mistaken premise that this was the district court's only reason for denying a "quality" adjustment, petitioners assert that the court of appeals' subsequent decision reducing the lodestar rates to the firm's own

rates requires a countervailing "quality" increase, or at least a remand. In denying the requested multiplier, however, the district court also had relied on two other independent grounds. It found, first, that the case was not "exceptional" as that term has been defined in the relevant precedents (App. 115a). Second, the district court denied the premium because of "counsels' extensive reliance upon the skill and experience of highly-compensated partners," who were being compensated for that time at partner rates despite Northwest's objection that the firm's partner/associate staffing pattern in this case was unreasonably inefficient (App. 91a n.19; *see* App. 114a). [1]

On appeal, the court of appeals affirmed the decision not to award a quality multiplier, holding that under the standards that this Court enunciated in *Blum* v. *Stenson, supra,* the district court's finding that "the case . . . simply was not 'exceptional' " (App. 115a) precluded the award of a quality multiplier. The court also concluded that reducing the lodestar hourly rates did not warrant remanding the case to reexamine the request for a quality multiplier, since there was no "evidence that plaintiffs' counsel provided services that were 'superior' to those services provided at the firm's normal rates" (App. 41a-42a n.128).

4. Contingency Multiplier

Petitioners' counsel also requested a separate 100% bonus for contingency, the "risk of non-success." The district court granted the request. Since counsel's "receipt of fees depended on the successful termination of the litigation," the court believed that the firm was "*entitled*

1. Approximately 64 percent of the lawyer time logged during the merits phase of this case was expended by partners (App. 91a n.19).

to a risk adjustment," as a matter of law (App. 116a) (emphasis in original). In determining the size of the contingency bonus, the district court adopted the statistical model for calculating contingency multipliers proposed by petitioners: the appropriate multiplier is the reciprocal of the likelihood of success viewed *as of the outset of the litigation* (App. 119a-120a). Thus, in this case, where the district court found that the chances of winning or losing were equally likely, the court concluded that a doubling of the lodestar was necessary to compensate for risk.

In making that determination, the district court rejected as irrelevant the fact that counsel's risk had declined steadily over the course of the litigation. It was in 1973 that the district court had found various violations of Title VII and the Equal Pay Act, thus establishing that petitioners would be entitled to attorneys' fees. Then in 1975 Northwest chose not to appeal its liability on several Title VII issues, *see Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 437 n.10, 439 n.24 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), thereby assuring petitioners' counsel that they would receive a fee award to which "prevailing parties" are entitled. The level of contingency continued to decrease progressively in 1976, when the court of appeals affirmed the imposition of backpay liability; in 1977, when the court denied the petition for rehearing; and in 1978 when this Court denied Northwest's petition for certiorari. Indeed, approximately half of the "merits" hours for which petitioners' counsel have been awarded compensation were expended *after* the remand to the district court in 1978, during a phase of the litigation concerning the determination of the individual backpay awards. Thus, most of the hours for which compensation has been sought were spent by attorneys who were reasonably confident of payment,

and at least half of the time was spent when the attorneys were virtually certain to receive remuneration.[2]

Against this backdrop, the court of appeals reversed the award of a 100% contingency multiplier, holding that "the district court applied an erroneous legal standard when it assumed that plaintiffs' counsel were *'entitled'* to a contingency enhancement" (App. 50a) (emphasis in original). The court of appeals ruled that the mere fact that a lawyer litigates a case on a contingent-fee basis does not create an automatic entitlement to a contingency enhancement in every case. The court also rejected the approach urged by petitioners and accepted by the district court under which "the contingency multiplier represents simply the inverse of the risk factor," because (1) under those circumstances the risk multiplier would be highest when the defendant had the strongest case, thereby "creating a perverse penalty for the least culpable" and (2) "the chances of winning could not be set with anything approaching mathematical precision" (App. 45a).

The court of appeals then went on to consider petitioners' argument that the district court had actually awarded a contingency "enhancement" based on a "more sophisticated analysis" that considered "not only . . . the initial outlook for success, but also . . . the magnitude of what was placed at risk" (App. 48a). The court of appeals noted that in *Blum* this Court had cast doubt on the propriety of any

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2. In addition, petitioners' counsel have not incurred many of the large expense items frequently associated with class action litigation. For example, Northwest bore some of the cost of providing notices to class members. Northwest also furnished air transportation to plaintiffs and their attorneys during the pre-trial and trial stages of the litigation. During the remedial stages of the litigation, Northwest personnel performed the backpay and other calculations necessary to implement the remedy and paid the expert hired by petitioners' counsel to audit those calculations.

contingency enhancements, because the Court expressly reserved the question "whether the risk of not being the prevailing party . . . may ever justify an upward fee adjustment." 104 S.Ct. at 1550 n.17. The court of appeals, nevertheless, assumed that courts may grant such enhancements in appropriate, "exceptional" cases (App. 49a) (quoting *Blum* and *Hensley*). The court concluded, however, that the facts of this case as found by the district court do not warrant a contingency enhancement. Since even at the outset plaintiffs were at least as likely to succeed as not, and even that prospect of ultimately obtaining fees increased as the case wore on, the case simply did not present an "unusual" level of risk:

> "Regardless whether contingency enhancements are ever warranted, it is clear in this case that a showing sufficient to qualify plaintiffs' counsel for an enhancement cannot be made" (App. 49a).

Petitioners' counsel then sought certiorari.

REASONS FOR DENYING THE WRIT

None of the questions raised in the petition warrants further review.

I. THE HOLDING THAT A REASONABLE ATTORNEYS' FEE TO A PRIVATE, FOR-PROFIT LAW FIRM SHOULD BE PRESUMPTIVELY BASED ON THE FIRM'S REGULAR HOURLY RATES RAISES NO NOVEL ISSUE AND IS CONSISTENT WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS.

While the case was pending in the court of appeals, this Court decided in *Blum* v. *Stenson, supra,* that attorneys'

fees awarded under fee-shifting statutes are to be based on the "prevailing market rate" for the lawyer's services. The court of appeals, therefore, viewed its "rather narrow task" as determining whether the district court had correctly ascertained the "reasonable market rate" for the services of petitioners' counsel (App. 18a). The court soundly held that the reasonable hourly rates for attorneys in a private, for-profit law firm must be presumptively based upon the rates that firm actually commands in the marketplace for legal services: "[t]he marketplace best measures 'market value'; appraisal by no other method has as much claim to veracity and objectivity" (App. 28a). That holding is consistent with this Court's precedents, Congress's intent as expressed in the Civil Rights Attorney's Fees Awards Act, and the decisions of the circuits.

Petitioners actually concede that "in many cases — perhaps most — the billing rates of a private, for-profit lawyer are an accurate reflection of, indeed are a direct function of, the prevailing market value of that lawyer's services" (Pet. at 15 n.10). Petitioners thus admit that the general principle recognized in the decision below is correct; their quarrel is simply with the application of that principle to this case. Since it is undisputed that petitioners' counsel are "private, for-profit" lawyers, petitioners are asking this Court to decide whether the court below should have excepted a particular law firm from an admittedly correct general principle. That is not an issue worthy of this Court's review.

A. The Decision Below Is Consistent With This Court's Precedents.

In an effort to suggest that some broader question is at stake, petitioners assert that the decision below is philosophically inconsistent with this Court's ruling in *Blum* v. *Stenson, supra*. In *Blum*, the Court simply held that non-profit

legal service organizations are to receive attorneys' fees based upon "prevailing market rates," rather than on the "costs" of providing the services. 104 S.Ct. at 1547. The Court thus ruled that the *basis* for a fee award should not turn on the form of organization through which the plaintiff obtains legal services. In every case, the market-oriented "lodestar" approach is to be used, so that the fee represents the product of a reasonable hourly rate multiplied by a reasonable number of hours.

The issue in the present case is a mechanical one: Did the court below select the most reliable indicator of the reasonable market rate for a particular lawyer? The Court did not hold in *Blum*, as petitioners imply, that the *rates* to be awarded to all attorneys of a given level of experience and skill in a community ought to be identical. On the contrary, the Court explained the economic underpinnings of the term "prevailing market rate" in terms that preclude that conclusion:

> "Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively — even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely." (*Id.* at 1547 n.11)

Applying the economic analysis set forth in *Blum*, the court of appeals here soundly recognized that, "[f]or private law firms, the prevailing market rate for the firm's services is

presumptively found in the firm's customary billing rates" (App. 39a-40a) (emphasis added). The court reasoned that

> "when fixed market rates already exist [for the petitioning firm or lawyers within the firm], there is no good reason to tolerate the substantial costs of turning every attorneys fee case into a major ratemaking proceeding. *In almost every case, the firms' established billing rates will provide fair compensation.* The established rates represent the opportunity cost of what the firm turned away in order to take the litigation; they represent the lawyers' own assessment of the value of their time" (App. 40a) (emphasis in the original).

That approach, which petitioners concede is appropriate in "many cases — perhaps most" (Pet. at 15 n.10), is in accord with the legislative purpose, reiterated in *Blum*, that:

> "A 'reasonable attorneys' fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys' " 104 S. Ct. at 1548 (quoting S. Rep. No. 1011, 94th Cong; 2d Sess. 6 (1976). *See* App. 20a-23a.

As the court of appeals also observed, determining the appropriate hourly rates to award to a private, for-profit lawyer based upon the lawyer's "opportunity cost" simply "reaffirms" the Circuit's "past practice" (App. 35a) in *Copeland* v. *Marshall, supra*, and other cases, *e.g.*, *National Association of Concerned Veterans* v. *Sec'y of Defense, supra*. In *Copeland*, for example, the *en banc* court had awarded a for-profit law firm its customary hourly rates for hours worked in a lengthy Title VII case, noting that the "prevailing hourly rate" for a fee applicant is his rate "established by the pressures of the market mechanism." 641 F.2d at 898 n.35.

In *Blum*, of course, it was necessary to construct a hypothetical "market rate" for the plaintiffs' lawyers, because as employees of a non-profit organization they had no market-tested hourly billing rates. Despite petitioners' assumption here, though, nothing in *Blum* requires a court to conduct such a costly, artificial valuation when the lawyer seeking a fee award practices with a private law firm that regularly bills its clients for his services at an established hourly rate. As the court of appeals found, that is the case here.

The ruling of the court of appeals also implements the policy that this Court expressed in *Blum* and *Hensley*, *supra*, that procedures for setting attorneys' fee awards must, if possible, avoid a "second major litigation." The court below found that the district court's "ratemaking" approach — which attempts to construct an attorney's "true value" regardless of his actual billing rate — necessarily entails "voluminous records, expert testimony, elaborate economic models, and so forth" and, as this case demonstrates, leads to huge expenditures of time and money in fee litigation. The court of appeals observed that presumptive reliance on established billing rates avoids complex and costly fee proceedings and encourages settlement, since the "combination of documented billable hours and a predictable hourly rate yields a projected lodestar figure that the parties can expect will withstand scrutiny" (App. 33a-35a).

B. The Opinion Below Raises No General Issue of Federal Law.

Petitioners attempt to leave the impression that the court below ruled that courts must use a private lawyer's own billing rate in *every* case. The court actually held, however, that district courts must begin "presumptively" with the private firm's own rates (App. 25a) and assume that, "*[i]n almost every case, the firm's established billing rates*

will provide fair compensation" as long as those rates "fall within the rates charged by other firms for similar work in the same community" (App. 40a, 41a) (emphasis in original). The court recognized, therefore, that there will be "unusual circumstances" (App. 40a) in which this presumption would not hold. For example, the court carefully noted that judicial "ratemaking" — *i.e.*, constructing a hypothetical rate based on other lawyer's fees — "must be tolerated" when "firms with no relevant billing histories are involved" (App. 40a). Thus, the opinion leaves ample room for fee applicants to show that their billing rates are not in fact market-tested.[3]

Petitioners, accordingly, are forced to argue that, even though the principle is sound and allows tailoring in specific cases, the court below reached the wrong result on the facts of this case. Such a fact-laden contention is hardly the appropriate subject of this Court's plenary attention. Nevertheless, we pause long enough to explain why the court of

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3. Amicus NAACP Legal Defense and Education Fund, Inc., like the petitioners, misunderstands the significance of the decision below, since the court did not hold, as the *amicus* fears, "that billing rates will absolutely fix the amount to be awarded" (Amicus brief at 12-13). To the contrary, the court below actually reaffirmed the principle that the courts must "construct" hourly rates "when calculating fee awards to attorneys or law firms *without* established billing practices" (App. 20a n.69) (emphasis in original), such as attorneys who are employed by or represent primarily public interest organizational clients.

Under the lower court's approach, if an attorney regularly discounts his customary billing rates for a specific type of litigation or takes only civil rights cases on a contingent fee basis, those would be important pieces of evidence for a court to consider in determining the "reasonable" rate for his services. That, however, is a far different situation from this case, where petitioners' counsel charge the same hourly rates for both employment discrimination litigation and other types of legal work.

appeals correctly rejected counsel's argument that their customary billing rates "do not reflect the market value of [their] services" (Pet. at 15).

Counsel assert that "where . . . a lawyer's established billing rates are a function of such *non-economic* factors as the choice to represent a particular clientele *that cannot afford to pay prevailing market rates*, that lawyer's billing rates do not reflect the value of his services on the open market" (Pet. at 16 n.10) (emphasis added). There are several reasons why this argument is unavailing here. First, the record belies its major premise, since the firm's clients are essentially large national labor unions whose treasuries surely enable them to pay fair rates. As the court below noted, even if counsel's clients "cannot afford *unlimited* legal fees," this situation "fails to distinguish them" from most clients in the market (App. 19a n.69) (emphasis added). Second, it is unsound to imply that, because counsel believe that their rates are "substantially below those prevailing in the District of Columbia" (Pet. at 5), they are charging all their own clients "reduced rates" that must be inflated when the opposing party must pay their fees (Pet. at 18).

Petitioners' argument mistakenly assumes, contrary to this Court's analysis in *Blum*, that there is a *single* "prevailing" market rate for attorneys. The argument is economically unsound; the market price for a good or service takes into account all factors of demand and supply, including the seller's subjective preferences. Moreover, the argument improperly presumes that the only theoretically "prevailing market rate" in a community is the premium rate charged by the most expensive law firms. In this case as in most others, counsel's customary rates actually do reflect a variety of market-related factors, including the extent of their clients' willingness to pay and the lawyers' willingness to provide services at those rates.

Therefore, it is hardly surprising that the court below rejected petitioners' arguments and held that the district judge had no legitimate reason to ignore the firm's established rates. In reaching that conclusion, the court relied on extensive evidence in the record that (1) the firm routinely charges its customary hourly rates to its regular clients both for prosecuting and for defending employment discrimination cases such as this one, (2) those rates are at the high end of the range of rates charged by labor law attorneys, and within the range of rates awarded to civil rights practitioners for similar litigation in the District, and (3) the firm's own clients believe, as one had independently testified in another proceeding, that the firm's customary rates "represented, in fact and in practice, the universally accepted measure of the fair value of services rendered" (Northwest Initial Submission, Exh. 27). The court's ruling, which is tied to the particular facts of this case, raises no issue of general importance.

In an effort to pique some interest in the fact-specific ruling below, petitioners conjure some "anomalies" that allegedly will result from the decision. For example, they imply that there is something odd about basing the reasonable hourly rate for an attorney's services on "the type of practice he has chosen to follow or of the type of clients he has chosen to represent in cases *other* than the one before the court" (Pet. at 17, emphasis in original). That outcome, however, is certainly no more unusual than the one they propose: compensating a lawyer for *his* time on the basis of *another* lawyer's type of practice.

Petitioners also discuss at length a hypothetical lawyer who must choose among three different career opportunities, but who may receive differing fee awards depending upon his choice (Pet. at 17-18). The supposed anomaly exists only if one ignores the flexibility that the court of appeals carefully built into its opinion. The court held that a

private lawyer's customary billing rate is the *presumptively* reasonable lodestar rate for his time in statutory fee cases, but only if his customary rate "falls within the [range of] rates charged by other firms for similar work" . . . (App. 40a-41a). Thus, the hypothetical attorney representing indigent clients would receive his customary hourly rate if it fell within the range of rates charged in the community. If it did not, a "constructed" award at a rate within that range would be permissible.

Similarly, nothing in the court's opinion suggests, as petitioners' hypothetical assumes, that the reasonable hourly rate constructed for a salaried lawyer employed by a non-profit legal services organization would be identical to the rate charged by a lawyer at the highest priced "corporate" law firm. The constructed rate in that situation would have to fall within the "range" of rates charged in the community for similar legal services. By the same token, even the "corporate" lawyer would not necessarily obtain his customary rate if it exceeds the range of rates charged in similar cases. *See Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 684 (N.D. Cal. 1974). Thus, the hypothetical presents no real anomalies, but simply illustrates that different inquiries are necessary in different contexts.

Finally, petitioners also suggest that it would be anomalous if they receive their customary hourly rates, because those rates may be lower than the rates awarded by the district court in *Blum* (Pet. at 18 n.11). There is, however, nothing "anomalous" in such an outcome. The reasonableness of the rates awarded to legal services attorneys by the district court in *Blum* was not controverted by specific evidence in the record. 104 S.Ct. at 1545. In this case, by contrast, the record is replete with evidence that the firm's customary rates actually reflect their market value. Under these circumstances, the real anomaly would be to require the defendant here to pay petitioners' counsel more for their

services to the petitioners than the firm charges its own regular clients for litigating similar cases.[4]

C. There Is No Circuit Conflict.

Petitioners also claim that the opinion below conflicts with the decisions of other circuits. They point directly to only two allegedly conflicting decisions in the Ninth Circuit; beyond the Ninth Circuit, they vaguely assert merely a conflict with "general principles announced" by several other circuits (Pet. at 19-20). In fact, there is no circuit conflict on the selection of appropriate hourly rates to be awarded to private law firms. The circuits that have addressed the question now uniformly agree that, in the

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4. In the court below, Northwest argued that, because petitioners' counsel utilized a disproportionate amount of partner time in the underlying litigation — 64% of all time devoted to the merits — the district court's use of large-firm hourly rates was doubly improper unless the court held counsel to large-firm staffing patterns (which evidence showed to be about 1/3 partner time and 2/3 associate time). Thus, Northwest challenged the district court's refusal to reallocate thousands of specifically identified hours expended by partners on such activities as basic legal research and initial drafting of pleadings and to compensate those hours only at associate rates.

The court of appeals noted that, "[i]f this court were to adopt the approach [to hourly rates] followed by the district court, there would be some merit to this argument" (App. 43a). But the court did not decide whether the requested reallocations should be made, because it remanded for a calculation of the lodestar based on counsel's own customary rates:

> *"[B]y deferring to the market we have obviated the need to set a 'true' staffing pattern to go along with a 'true value' set on the firm's services"* (App. 44a) (emphasis in original).

Thus, if this Court were to disagree with the court of appeals on selection of the reasonable hourly rates, the case would have to be sent back to the court of appeals for further proceedings on the staffing issue.

absence of unusual circumstances, the presumptively reasonable hourly rate for a private, for-profit attorney with a regular fee-paying clientele is his customary billing rate.[5]

Neither of the Ninth Circuit decisions on which petitioners principally rely even addresses this issue, so there is no basis to claim a conflict. In *White* v. *City of Richmond*, 559 F. Supp. 127, 130-31 (N.D. Cal. 1982), *aff'd*, 713 F.2d 458 (9th Cir. 1983), the district court constructed a reasonable hourly rate for the services of a lawyer employed by the NAACP and two private lawyers who generally represent plaintiffs in civil rights cases. 559 F. Supp. at 132 n.4. The Ninth Circuit affirmed the award even though the private lawyers had not submitted evidence about their bills to other clients. The court of appeals noted that "many civil rights practitioners," apparently including the private lawyers

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5. *See, e.g., Grendel's Den, Inc.* v. *Larkin*, 749 F.2d 945, 956 (1st Cir. 1984) (reducing rates awarded by the district court to the rate actually charged to other clients); *Cunningham* v. *City of McKeesport*, 753 F.2d 262, 267 (3d Cir. 1985) ("In the seminal *Lindy I* opinion this court held that the value of an attorney's time is generally reflected in his normal billing rate. Our premise was then, and still is, that the reasonable value of an attorney's time is the price that time normally commands in the marketplace"); *Wheeler* v. *Mental Health & Mental Retardation Authority*, 752 F.2d 1063, 1073 (5th Cir. 1985) ("Of the *Johnson* factors, the attorney's 'customary fee' is one that deserves special attention"); *Louisville Black Police Officers Org., Inc.* v. *City of Louisville*, 700 F.2d 268, 277 (6th Cir. 1983) ("[T]he marketplace normally sets a value for a private attorney's services"); *Henry* v. *Webermeier*, 738 F.2d 188, 195 (7th Cir. 1984) ("[T]he object of judicial fee determination is to simulate the results that would obtain if the lawyer were dealing with a paying client"); *Jorstad* v. *IDS Realty Trust*, 643 F.2d 1305, 1313 (8th Cir. 1981) (reducing hourly rates to amounts "more in line with the actual hourly rates charged by the attorneys involved"); *Ramos* v. *Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) ("If the lawyer seeking the fee is in private practice, his or her customary rate would be a relevant but not conclusive factor."); *Jones* v. *Central Soya Co.*, 748 F.2d 586, 593-94 n.16 (11th Cir. 1984) (affirming award of hourly rates based on those actually charged by plaintiff's attorney).

there, "do not bill their clients at an hourly commercial rate" and, therefore, it was "not an abuse of discretion in this type of case to use the reasonable community standard. . . . " 713 F.2d at 461. That approach is consistent with the principle recognized below that, "when calculating fee awards to attorneys or law firms *without* firmly established billing practices, the prevailing community rate for the services of lawyers of similar skill, experience, and reputation must be consulted" (App. 20a n.69) (emphasis in original). *See also* App. 26a.

Nor does the decision below conflict with *Manhart* v. *City of Los Angeles, Dept. of Water and Power*, 652 F.2d 904 (9th Cir. 1981), *vacated on other grounds*, 461 U.S. 951 (1983). The district court in *Manhart* had not used a lodestar analysis in awarding the attorneys' fee and had not specified what hourly rates it utilized in arriving at the fees awarded. *See* 652 F.2d at 907. The court of appeals nevertheless affirmed the award, holding that the district court had discretion to award a "reasonable" fee without using a lodestar "formula." 652 F.2d at 908. That free-wheeling approach, of course, cannot survive this Court's subsequent decisions in *Blum* and *Hensley*, so the case is of little force in any event. Petitioners focus on the comment that the "award also cannot be deemed excessive because it allowed a higher fee than set by the agreement between the union and its attorneys." 652 F.2d at 909. Nothing in either court's opinion, however, indicates anything about the nature of the agreement between the union and its attorneys, or about the attorneys' other billing practices, thus making it impossible to penetrate the basis for the fee award or to conclude that it conflicts with the holding below.

Furthermore, in other cases the Ninth Circuit has approved the use of a private law firm's regular hourly rates in computing the lodestar in Title VII cases. *E.g.*, *Thornberry* v. *Delta Air Lines, Inc.*, 25 EPD ¶ 13,495 (N.D.

Cal. 1980), *aff'd*, 676 F.2d 1240, 1243 (9th Cir. 1982), *vacated and remanded for reconsideration of other issue*, 461 U.S. 952 (1983) (awarding prevailing plaintiffs' attorneys their normal "billing rates"). And in *Stanford Daily* v. *Zurcher, supra*, one of the cases endorsed in the legislative history of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, *see Blum* v. *Stenson, supra*, 104 S. Ct. at 1546, the court awarded private lawyers rates in line with their "individual billing rates," 64 F.R.D. at 684. Thus, the decision below is well in line with other decisions throughout the country.

II. THE REFUSAL TO REMAND FOR RECONSIDERATION OF A QUALITY MULTIPLIER RAISES NO IMPORTANT ISSUE.

In *Blum* v. *Stenson, supra*, which was decided between the decisions of the district court and of the court of appeals, this Court articulated the test for quality multipliers:

> "The 'quality of representation' . . . may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' " 104 S. Ct. at 1549.

In denying the petitioners' request for a 100% bonus for the quality of representation, the district court did not have the benefit of this Court's guidance in *Blum*. The court of appeals, however, assessed the record in light of the standard set out in *Blum* and concluded that "there simply was no specific evidence that plaintiffs' counsel provided services that were 'superior' to those services provided at the firms' normal rates" (App. 42a n.128). Thus, the court of appeals found that petitioners had not satisfied the first of the two prongs of the *Blum* test.

The court of appeals also noted that the district court had specifically found against petitioners on the second prong when the court determined that this case "simply was not 'exceptional' as that term has been defined" by other decisions (App. 42a n.128). Petitioners imply (Pet. at 21 n.14) that the district court premised its adverse finding *solely* on the caliber of representation expected of those who command the high hourly rates that the court originally awarded. In addition, however, the district court found that the results were not "exceptional" because the "results obtained in this case also are consistent with the . . . number of hours devoted to the case" (App. 114a) — over 11,000 on the merits alone — and with the partner-heavy staffing pattern used by plaintiffs' counsel (almost 65% of the time expended was by more highly compensated partners). Moreover, the size of the judgment, which counsel emphasize in trying to justify their request for a quality multiplier, was simply the result of the size of the plaintiff class and the length of the recovery period, two phenomena for which petitioners' counsel can claim little credit. The court of appeals thus found that, on this record, petitioners had not met the second requirement of the *Blum* test either.

In these circumstances, where the district court's findings indicate that petitioners have not proven and could not prove either element of the *Blum* test, the court of appeals found that the record allowed it to decide that it is unnecessary to remand the case to reconsider the denial of a quality multiplier. That decision raises no significant issue. Petitioners have not even alleged any conflict with the decisions of this Court or other circuits on this fact-specific issue, nor could they.

III. THE REVERSAL OF A 100% CONTINGENCY MULTIPLIER RAISES NO IMPORTANT ISSUE AND IS CONSISTENT WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS.

Petitioners attempt to manufacture a circuit conflict by characterizing the decision below as effectively holding that contingency bonuses are never permissible. The court of appeals, however, did *not* so hold. While acknowledging that this Court in *Blum* questioned whether Congress has authorized contingency multipliers under fee-shifting statutes, the court below expressly assumed that such adjustments may be permissible in appropriate cases. That assumption *arguendo* poses no conflict with any other decision. The court then merely held that the district court's findings were inadequate to justify a 100% contingency premium in this case.

In reaching that conclusion, the court rested on three unexceptionable rulings. First, the court held that "the district court applied an erroneous legal standard when it assumed that plaintiffs' counsel were *'entitled'* to a contingency enhancement" (App. 50a). In ruling that fee applicants are not *automatically* entitled to a contingency bonus, the court below was reiterating a principle necessarily established in this Court's intervening decision in *Blum* v. *Stenson, supra*. The Court there reversed a risk multiplier awarded to counsel whose fees were entirely contingent upon the success of the litigation. 104 S. Ct. at 1550. Although the Court did not decide whether and when such multipliers *may* be awarded, the unavoidable import of the outright reversal of the contingency multiplier in *Blum* is that mere contingency of the fee is not enough to establish *entitlement* to a risk multiplier. Every circuit that has faced the question since this Court's decisions in *Hensley* and

Blum has rejected any notion of entitlement to risk premiums.[6]

Second, the court of appeals ruled that, like any upward adjustment in the lodestar, any contingency "enhancements" could only be appropriate "in an exceptional case" (App. 49a). This ruling, too, simply applies the test that this Court expressly articulated in *Hensley* and *Blum*. *See* App. 49a.

Third, the court of appeals held that the nature and extent of the risk of non-compensation were not serious enough to warrant doubling the lodestar for "contingency."[7] The district judge had justified a 100% contingency premium because he found that, at the outset of the case, the petitioners had a 50-50 chance of prevailing. The court of appeals quite reasonably ruled that a 50% chance of winning "reflects the norm for litigated cases" and thus that the

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6. *See, e.g., McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984) ("In this circuit, the risk of losing *'alone* does not justify the use of a multiplier' ") (emphasis added); *Carmichael* v. *Birmingham Saw Works*, 738 F.2d 1126, 1138 (11th Cir. 1984) ("The law does not require 'that there must be enhancement in every case in which the fee is contingent' "); *Wheeler* v. *Mental Health & Mental Retardation Authority, supra*, 752 F.2d at 1073 ("A trial court is not required to enhance an award because of the contingent nature of the case."); *Hall* v. *Borough of Roselle*, 747 F.2d 838, 844 (3d Cir. 1984) (reversing contingency multiplier in contingent fee case); *Louisville Black Police Officers* v. *City of Louisville, supra*, 700 F.2d at 280 (district courts not required to award contingency multipliers).

7. Appellate courts carefully scrutinize contingency multipliers awarded by lower courts and reverse multipliers when the record does not justify them. *See, e.g., Blum* v. *Stenson, supra; Paschall* v. *Kansas City Star*, 695 F.2d 322, 338, *vacated on other grounds*, 727 F.2d 692 (8th Cir. 1982) (*en banc*), *cert. denied*, 105 S. Ct. 222 (1984); *Hall* v. *Borough of Roselle, supra; New York State Ass'n for Retarded Children* v. *Carey*, 711 F.2d 1136, 1154 (2d Cir. 1983); *City of Detroit* v. *Grinnell Corp.*, 560 F.2d 1093, 1102 (2d Cir. 1977); *Baughman* v. *Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1217-1219 (3d Cir. 1978).

"level of risk was not unusual in this case" (App. 50a-51a). (Indeed, plaintiffs actually prevail in far less than 50% of the civil cases filed; a lawyer who takes a contingent fee case that he has a 50% prospect of winning thus has an unusually high level of assurance.)

Furthermore, once the district judge had found liability in 1973, the risk of non-compensation diminished steadily and progressively as the case wore on; approximately half of the hours compensated by the district court for work on the merits were put in during the remedial phase of the litigation, when compensation was virtually assured. *See Ramos* v. *Lamm, supra*, 713 F.2d at 558 ("Once a case has been won in the district court, the risk of nonrecovery diminishes greatly"; a "contingency bonus should not be given for hours expended in the district court after remand"); *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624, 638 (6th Cir.), *cert. denied*, 447 U.S. 911 (1980) ("in a long and complicated lawsuit . . . only a portion of the time expended can be reasonably regarded as contingent").

The court of appeals thus concluded that, under these circumstances, "this case did not present an exceptional level of risk" and that "no risk enhancement should be awarded" (App. 51a). Petitioners' assertions about the "magnitude of what was placed at risk" are beside the point. This Court has firmly established that the "magnitude" of an attorney's efforts is reflected in the number of hours for which he is awarded compensation. *See Blum* v. *Stenson, supra*, 104 S. Ct. at 1548-49; *Donnell* v. *United States*, 682 F.2d 240, 253-54 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983). Since the decision below did no more than apply well established principles to the facts of this case, review of this issue is not warranted.

Finally, petitioners' counsel make much of the length of time that they have waited for payment of their fees. The

courts below, however, fully adjusted for any delay in payment by using current rates rather than historical rates for all hours credited, a technique approved by the courts for this purpose and actually requested in this case by petitioners. In any event, the complaint rings hollow in light of the litigation decisions that counsel have made. For instance, although Northwest was prepared in 1978 to address the calculation of attorneys' fees, petitioners' counsel asked the district court to defer that phase of the case until the completion of other proceedings on remand. *See* Order of April 14, 1978. As a result, the parties did not confront this question until several years later.[8] Petitioners' counsel, therefore, should not be heard to seek a "bonus" for the delays that they consciously chose to create.

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8. Furthermore, petitioners' counsel routinely sought extensions of time to file pleadings in this case. For example, petitioners did not file their pending petition for certiorari until seven months after the court of appeals filed its opinion. In almost every instance, including the motion for a two month extension to file their certiorari petition, petitioners explained that they needed those extensions in order to enable them to fulfill commitments to fee-paying clients in *other* cases. Although petitioners' counsel invariably sought extensions in this case, Northwest sought virtually none.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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